

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DIANA NICHOLS, 100 EVERGREEN  
HILL RD., FAIRFIELD, CT, 06824,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE  
CORPORATION, A RECEIVER FOR  
WASHINGTON MUTUAL BANK,

Defendant.

Case No. C14-1796RSM

ORDER DENYING DEFENDANT'S  
MOTION FOR JUDGMENT ON THE  
PLEADINGS

**I. INTRODUCTION**

This matter comes before the Court on Defendant's Motion for Judgment on the Pleadings. Dkt. #27. Defendant argues that Plaintiff's claims should be dismissed with prejudice because they are time-barred and because Plaintiff failed to meet the statutory requirements providing this Court with subject matter jurisdiction over her claims. *Id.* Pro Se Plaintiff opposes the motion, stating that the FDIC-Receiver has waived any statute of limitations argument, that her claims are subject to equitable tolling, that her claims cannot be barred by any statute of limitations, that one of her claims is based in contract and therefore the statute of limitations has not run on that claim, and that her claims are not subject to the Federal Tort Claims Act. Dkt. #30. For the reasons discussed herein the Court now DENIES Defendant's motion.

ORDER  
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## II. BACKGROUND

On November 22, 2014, *pro se* Plaintiff, Diana Nichols, filed a Complaint against Defendant Federal Deposit Insurance Corporation (“FDIC”) as Receiver for now-defunct Washington Mutual Bank (“WaMu”), alleging, *inter alia*, breach of contract, negligence, fair lending violations and fraud. Dkt. #1. Plaintiff served the FDIC in Washington, D.C., in March of 2015. Dkts. #3 and #4, Ex. 1. According to Plaintiff, in April of 2015 she received a letter via e-mail from an attorney at the law firm Miller, Nash, Graham and Dunn, stating that she represented the FDIC in the instant suit and admonishing Plaintiff for improperly performing service. Dkt. #4 at 3. However, that attorney had not appeared in this Court on behalf of Defendant at that time. As a result, Plaintiff moved for default judgment against Defendant, which the Court denied on the basis that Plaintiff had not completed service. Dkt. #15. Plaintiff apparently completed service at some point thereafter, and Defendant appeared in this case and filed an Answer to the Complaint. *See* Dkts. #12, #13, #14, #16, #17, #18, #19 and #20.

Plaintiff alleges that she is a resident of the State of Connecticut who entered into a home mortgage loan with WaMu in July of 2005. Dkt. #1 at ¶ 1. She further alleges that the loan was misrepresented to her both as to the nature and to the material terms of the loan. *Id.* at ¶ 13. She alleges that these misrepresentations effectively increase the amount of her loan principle over time, because the loan has been structured such that her monthly payment never fully covers the interest being generated on the loan. *Id.* at ¶ ¶ 16-29. As a result, Plaintiff alleges that she will never fully pay off the loan. *Id.* Plaintiff also alleges that she was coerced into refinancing her loan through WaMu at a particularly vulnerable time in her life, of which the loan officer was aware. *Id.* at ¶ 43.

1 Defendant admits that Plaintiff entered into a home loan with WaMu on or about July  
2 13, 2005. Dkt. #20 at ¶¶ 1 and 12. Defendant also admits that on September 25, 2008, the  
3 Director of the Office of Thrift Supervision closed WaMu and appointed the FDIC as Receiver.  
4 *Id.* at ¶ 3.

5 In June and July of 2014, Plaintiff apparently sought to file a late claim with the FDIC-  
6 Receiver. Dkt. #1 at ¶¶ 5-6. On July 23, 2014, Plaintiff received a letter stating that the FDIC  
7 had accepted her claim under the late-filed claims exception. *Id.* at ¶ 7. On September 25,  
8 2014, Plaintiff received a letter stating that her claim had been disallowed, and that she could  
9 file a lawsuit within 60 days of receiving the letter. *Id.* at ¶ 8. The instant lawsuit followed.  
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### 11 III. DISCUSSION

#### 12 A. Legal Standard – Motions for Judgment on the Pleadings

13 Rule 12(c) of the Federal Rules of Civil Procedure permits a party to move to dismiss a  
14 suit “[a]fter the pleadings are closed . . . but early enough not to delay trial.” Fed. R. Civ. P.  
15 12(c). “Judgment on the pleadings is proper when, taking all allegations in the pleading as true,  
16 the moving party is entitled to judgment as a matter of law.” *Stanley v. Trustees of Cal. State*  
17 *Univ.*, 433 F.3d 1129, 1133 (9th Cir. 2006); *see also Fleming v. Pickard*, 581 F.3d 922, 925  
18 (9th Cir. 2009). Because a motion for judgment on the pleadings is “functionally identical” to a  
19 motion to dismiss, the standard for a Rule 12(c) motion is the same as for a Rule 12(b)(6)  
20 motion. *See Platt Elec. Supply, Inc. v. EOFF Elec., Inc.*, 522 F.3d 1049, 1052 n.1 (9th Cir.  
21 2008).  
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23 In deciding a 12(b)(6) or 12(c) motion, this Court is limited to the allegations on the  
24 face of the complaint (including documents attached thereto), matters which are properly  
25 judicially noticeable and other extrinsic documents when “the plaintiff’s claim depends on the  
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1 contents of a document, the defendant attaches the document to its motion to dismiss, and the  
 2 parties do not dispute the authenticity of the document, even though the plaintiff does not  
 3 explicitly allege the contents of that document in the complaint.” *Knievel v. ESPN*, 393 F.3d  
 4 1068, 1076 (9th Cir. 2005). The Court must construe the complaint in the light most favorable  
 5 to the Plaintiff and must accept all factual allegations as true. *Cahill v. Liberty Mutual Ins. Co.*,  
 6 80 F.3d 336, 337-38 (9th Cir. 1996). The Court must also accept as true all reasonable  
 7 inferences to be drawn from the material allegations in the Complaint. *See Brown v. Elec. Arts,*  
 8 *Inc.*, 724 F.3d 1235, 1247-48 (9th Cir. 2013); *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir.  
 9 1998). However, the Court is not required to accept as true a “legal conclusion couched as a  
 10 factual allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*  
 11 *Twombly*, 550 U.S. 544, 555 (2007)).

## 14 **B. Extrinsic Documents**

15 The Court first addresses documents outside the pleadings upon which Plaintiff  
 16 apparently relies. In particular, Plaintiff cites to a letter she received from the FDIC-Receiver  
 17 disallowing her claim. *See* Dkt. #30 at 3.<sup>1</sup> Defendant does not dispute the content of the letter.  
 18 Dkt. #34 at 2. The Court will take notice of the letter as it has been incorporated by reference  
 19 in the Complaint. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); Dkt. #1 at ¶¶ 8  
 20 and 47. Accordingly, this motion proceeds under Federal Rule of Civil Procedure 12(c).

## 22 **C. Claims at Issue**

23 Plaintiff has alleged the following seven claims against Defendant: 1) breach of contract  
 24 and covenant of good faith and fair dealing; 2) negligence; 3) violation of the Truth In Lending  
 25 Act; 4) unconscionability; 5) unjust enrichment; 6) fraud in the factum; and 7) duress.

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27 <sup>1</sup> Although Plaintiff cites to the letter as an Exhibit to her Declaration, the Court notes that it  
 28 was filed as an attachment to her Response in opposition to the instant motion, but not with her  
 Declaration.

1 Defendant's motion pertains only to **Claims 1, 2, 6 and 7**. Dkt. #27 at 1 and 3. Defendant  
2 characterizes these four claims as tort claims, and, as noted above, seeks dismissal based on the  
3 statute of limitations or for lack of jurisdiction.

#### 4 **D. Governing Law**

5 Both parties are apparently proceeding on the premise that Connecticut law governs  
6 Plaintiff's claims. Plaintiff does not discuss the applicable law in her brief, while Defendant  
7 asserts without citing any authority that Connecticut law applies because Plaintiff alleged as  
8 much in her Complaint. Dkt. #27 at 3. Where pendent state-law claims are asserted in  
9 conjunction with a federal claim, the district court should follow the choice-of-law rules of the  
10 forum state. *See Paracor Fin. v. General Elec. Capital Corp.*, 96 F.3d 1151, 1165 n.17 (9th  
11 Cir. 1996). Accordingly, the Court looks to Washington's choice of law rules. Under  
12 Washington's choice of law rules, local law presumptively applies unless there is "an actual  
13 conflict between the laws or interests of Washington and the laws or interests of another state."  
14 *Seizer v. Sessions*, 132 Wn.2d 642, 648, 940 P.2d 261 (1997). An "actual conflict" exists if the  
15 application of another state's law would produce a different result on a particular legal issue.  
16 *Erwin v. Cotter Health Ctrs.*, 161 Wn.2d 676, 692, 167 P.3d 1112 (2007). If an actual conflict  
17 exists, the Court applies the "most significant relationship" test to determine which state's law  
18 applies. *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580, 555 P.2d 997 (1976).

19 As the party seeking application of another state's law, Defendant bears the burden of  
20 demonstrating that a conflict exists. *See Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 100,  
21 864 P.2d 937 (1994). In this case, Defendant has failed to do so. Accordingly, the Court  
22 applies Washington law, not Connecticut law, to the issues raised in this motion. The Court  
23 now turns to Defendant's substantive arguments.  
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**E. Tort Claims Act**

Defendant initially argued that Plaintiff's claims were barred for her failure to follow the administrative procedures under the Federal Tort Claims Act. Dkt. #27 at 6. However, Plaintiff clarified that she was not asserting claims against the FDIC-Receiver itself; therefore, Defendant now agrees that the Tort Claim Act is not applicable and it no longer asserts its jurisdictional argument. *See* Dkts. #30 at 7-8 and #34 at 4-5.

**F. Statute of Limitations**

The Court next turns to Defendant's argument that Plaintiff's tort claims are time-barred. *See* Dkt. #27 at 3-5. In order to evaluate the argument, the Court must determine whether Plaintiff's claims are indeed torts, and the applicable statute of limitation to those claims. Defendant alleges that a three-year statute of limitations applies to the four claims. Plaintiff appears to dispute only her claim for breach of contract and covenant of good faith and fair dealing, asserting that the claim sounds in contract not tort, and therefore a six-year statute of limitations applies to that claim. *See* Dkt. #30 at 6-7.

As an initial matter, the Court notes that in her Complaint, Ms. Nichols did not allege the tort of bad faith, but rather a breach of the covenant of good faith and fair dealing inherent in her mortgage contract. Dkt. #1 at ¶¶ 64-72. She reasserted that claim in her response to Defendant's instant motion. Dkt. #30 at 6-7. In Washington, "there is no 'free-floating' duty of good faith and fair dealing that is unattached to an existing contract." *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wash. 2d 171, 177, 94 P.3d 945, 949 (2004). Thus, the Court agrees that Plaintiff's claim sounds in contract. However, this Court has previously determined that such claims, although arising out of the contract at issue, are subject to a three-year statute of limitations. *Pruss v. Bank of Am. Na*, 2013 U.S. Dist. LEXIS 157286 at \*12-13 (W.D. Wash.

1 Nov. 1, 2013) (explaining that a claim for “breach of the duty of good faith and fair dealing  
2 claims are subject to a three year statute of limitations.” (citing RCW § 4.16.080)). Likewise,  
3 the torts of negligence and fraud in the factum are also subject to the three-year statute of  
4 limitations. *Id.* Therefore, however they are characterized, these claims are subject to a three-  
5 year statute of limitations. Accordingly, the Court must examine whether the claims are now  
6 time-barred.  
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8 In her Complaint, Plaintiff alleges that her claims arise out of a contract into which she  
9 entered on July 13, 2005. Dkt. #1 at ¶ 12. The alleged misrepresentations forming the basis of  
10 her claims were alleged to have occurred between June 2, 2005, when a broker reached out to  
11 offer her a loan, and the date she signed the mortgage contract. *Id.* at ¶ ¶ 15-30. However,  
12 Plaintiff alleges that she did not actually learn of the way the terms of her loan worked until  
13 some point later in time because she suffered from a mental disability at the time she entered  
14 into the agreement. *Id.* at ¶ ¶ 34-35. Although it is not entirely clear when Plaintiff believes  
15 the three-year statute of limitations began to run, she appears to accept that it had run by the  
16 time she sought to file her late-filed administrative claim with the FDIC-Receiver in 2014. *See*  
17 Dkt. #30 at 2. Accordingly, she now argues that the FDIC-Receiver waived the statute of  
18 limitations by accepting her late-filed claim and disallowing it on the merits, that her claims are  
19 subject to equitable tolling, and that her claims are not subject to the statute of limitations  
20 because she could raise them as affirmative defenses to a foreclosure action. Dkt. #30 at 2-7.  
21 The Court addresses these arguments in turn, below.  
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25 *I. Waiver*

26 With respect to Plaintiff’s waiver argument, the Court is left without much guidance  
27 from either party. Indeed, Defendant provides no case law analyzing this issue, and instead  
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1 relies on a bare recitation of the statute relating to claims filing and its own interpretation  
2 thereof. *See* Dkt. #27 at 4-5. This Court has previously determined that compliance with the  
3 administrative claims procedure is a jurisdictional requirement to bringing a federal suit. *See*  
4 *Kuhlmann v. Sabal Fin. Group LP*, 26 F. Supp.3d 1040, 1047 (W.D. Wash. 2014) (explaining  
5 that “the statute strictly limits federal courts’ ability to adjudicate claims that are not first  
6 exhausted within the FIRREA’s administrative process.”). While the Court did not consider  
7 the issue presented here, it does provide some guidance. Indeed, the Court previously noted  
8 that the exception for late-filed claims “does not itself vest the Court with jurisdiction to  
9 consider a late-filed claim; it merely confers discretion upon the FDIC as receiver to do so.”  
10 *Kuhlmann*, 26 F. Supp.3d at 1051 (citing *Freeman v. FDIC*, 56 F.3d 1394, 1402, 312 U.S. App.  
11 D.C. 324 (D.C. Cir. 1995) (The “only consequence [of improper notice under FIRREA] is that  
12 the FDIC ‘may’ consider a late-filed claim.”)). In the instant matter, the Court agrees with  
13 Plaintiff that the FDIC accepted Plaintiff’s late-filed claim and disallowed it on the merits. *See*  
14 Dkt. #30, Attached Letter. Plaintiff also filed the instant matter within 60 days of the date of  
15 that letter. However, that does not equate to the FDIC-Receiver waiving any statute of  
16 limitations defense. Accordingly, the Court concludes that Defendant has not waived a statute  
17 of limitations defense.  
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## 21 2. *Equitable Tolling*

22 Thus, the Court turns to Plaintiff’s equitable tolling argument. Defendant argues that  
23 Plaintiff’s claims cannot be equitably tolled under Connecticut law. However, the Court has  
24 already determined that Washington law applies to this matter. Washington courts have long  
25 held that equitable tolling gives a court power in equity to set aside a judgment, even where the  
26 statute of limitations on a challenge to the judgment has run. *Ames v. Dep’t of Labor & Indus.*,  
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1 176 Wash. 509, 30 P.2d 239 (1934). This Court acknowledges that Washington courts have  
2 applied the doctrine sparingly because it essentially allows a judicial branch officer to override  
3 a legislative determination. *See Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 185 P.2d  
4 113 (1947).

5 Equitable tolling “applies when the plaintiff is prevented from asserting a claim by  
6 wrongful conduct on the part of the defendant, or when extraordinary circumstances beyond the  
7 plaintiff’s control made it impossible to file a claim on time.” *Stoll v. Runyon*, 165 F.3d 1238,  
8 1242 (9th Cir. 1999). Washington case law also makes clear that some degree of vulnerability  
9 may allow for relief through equitable tolling. *See Ames*, 176 Wash. 509 (wherein the plaintiff  
10 was adjudicated insane); *Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d 949, 540 P.2d 1359  
11 (1975) (wherein the plaintiff was extremely illiterate and did not speak English). But while  
12 vulnerability may be a necessary condition, it is not alone sufficient. Recognizing the need to  
13 respect legislative choices, the Washington Supreme Court has required a particularized  
14 showing that applying a limitation period to the particular plaintiff would work an injustice.  
15 *See Ames*, 176 Wash. at 510 (applying equitable tolling where plaintiff did not receive notice of  
16 the action); *Rodriguez*, 85 Wn.2d at 950 (applying equitable tolling where plaintiff received  
17 notice but could not read it and had no interpreter); *Kingery v. Dep't of Labor & Indus.*, 132  
18 Wn.2d 162, 174, 937 P.2d 565 (1997) (wherein a plurality of the court explained that equitable  
19 tolling applies where some infirmity prevents the plaintiff from understanding the action); *id.* at  
20 179 (ALEXANDER, J., dissenting) (explaining a majority view that equitable tolling would apply  
21 if plaintiffs missed a statute of limitations due to “circumstances largely beyond their control”);  
22 *Leschner*, 27 Wn.2d at 927 (declining to apply equitable tolling where plaintiff was  
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1 appropriately notified of action, though falsely told by doctor that he had submitted a claim,  
2 and pursued no further action despite no communication from the department for four years).

3 In this case, Plaintiff explains the circumstances preventing her from bringing her claim  
4 within the applicable statute of limitations. Dkt. #31 (*filed under seal*). For those same  
5 reasons, the FDIC-Receiver apparently accepted her late-filed claim. The Receiver did not  
6 deny the claim for being untimely; rather, it denied the claim on the merits, stating:  
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8 After careful review of your claim, all of the documentation/evidence you  
9 have filed in support and the records of the failed bank, you have failed to  
10 provide sufficient evidence and documentation to prove the substance of  
11 your claim to the satisfaction of the Receiver. Therefore, your claim is  
12 disallowed.

13 Dkt. #30, Attached Letter. The letter then went on to state that Plaintiff had 60 days to file a  
14 lawsuit if she disagreed with the disallowance. *Id.* Plaintiff did so.

15 Considering Plaintiff's personal circumstances and her vulnerability at the time the  
16 mortgage loan was made, and given the Receiver's acceptance of her late-filed claim, the Court  
17 finds equitable tolling appropriate in these circumstances. Accordingly, the Court finds that  
18 Plaintiff's are not time-barred and they will be allowed to proceed. The Court notes, however,  
19 that nothing in this Order is intended to imply how the Court will view these claims on their  
20 merits.

21 Finally, with respect to Plaintiff's claim for duress, the Court notes that duress is  
22 typically considered as an affirmative defense to invalidate a contract, rather than as an  
23 independent claim. *Prosser & Keeton On Torts*, § 18 at 121 (5th ed. 1984) (noting that the  
24 majority rule is that duress is not an affirmative cause of action). Accordingly the Court deems  
25 Plaintiff's duress cause of action as an affirmative defense, rather than as a separate claim  
26 against Defendant.  
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**IV. CONCLUSION**

Having reviewed Defendant's Motion for Judgment on the Pleadings, Plaintiff's opposition thereto, and Defendant's Reply in support thereof, along with the remainder of the record, the Court hereby finds and Orders:

1. Defendant's Motion for Judgment on the Pleadings (Dkt. #27) is DENIED.
2. Plaintiff's claims for breach of contract and covenant of good faith and fair dealing, negligence and fraud in the factum shall proceed.
3. Plaintiff's duress claim shall be deemed as an affirmative defense rather than as a separate claim against Defendant.

DATED this 22 day of February, 2016.



RICARDO S. MARTINEZ  
CHIEF UNITED STATES DISTRICT JUDGE